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No. 03-1268

Supreme Court, U.S.
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In The
Supreme Court of the United States

CITY OF ANAHEIM, a California Municipal Entity; ANAHEIM POLICE DEPARTMENT, a California Municipal Entity; ROGER BAKER; CHRISTOPHER NED; KRISTI VALENTINE; BRIAN MCELHANEY; GREGORY SAWYER,

Petitioners,

vs.

BRIAN THOMAS DRUMMOND, by and through his Guardian Ad Litem Thomas R. Drummond,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT BRIAN THOMAS DRUMMOND, by and through his Guardian Ad Litem Thomas R. Drummond

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QUESTIONS PRESENTED

1. Whether the police officers' act of crushing a detainee against the ground by pressing their weight onto his neck and torso as he lay handcuffed on ground and begged for air when he was wanted for no crime constituted excessive force as a matter of clearly established law, when their own department policies as well as other sources fairly warned them of the deadliness[1] of such conduct?

2. Where the district court found the officers did not have reason to believe that Drummond could not breath, despite two independent witnesses who said he begged for air, and the appellate court reversed it by holding that it erred in its predicate judgment that the facts alleged do not support a finding of a constitutional violation because officers – indeed, any reasonable person – should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable, can the Appellate Court be said to have departed drastically from the standards of review on summary judgment?

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[1] Respondent here uses the term "deadliness" in its colloquial sense of being capable of causing serious injury or death, not in the sense of the legal term of art "deadly force", meaning reasonably likely to cause death. The Court of Appeals neither made the determination that there was deadly force, nor was such a determination necessary to their holding.

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The questions raised by the petitioners rest largely on mischaracterizations of the record and do not present any real issue suitable for review by this court. Contrary to the petitioners' strained assertions, there is not an intercircuit conflict of authority, nor is there a conflict with any decision of this Court, nor has the appellate court departed drastically from the standard on summary judgment. Moreover, there is no undecided federal or constitutional question at issue in this case. The questions which petitioners endeavor to set forth are not in reality presented by this case.

As will be demonstrated *infra*, the ostensible conflict between the opinion below and other circuits is exclusively an instance of differences distinguishable on the facts of the cases.

Petitioners' assertion that the Ninth Circuit extended the concept of "clearly established law" beyond that recognized by this Court is not well founded. The Ninth Circuit looked to matters which this Court has recognized as proper in determining whether the constitutional violation was clearly established, including existing case law and the police department's own policies. Petitioners' attempt to characterize their conduct as an innocuous sort of "impact free restraint" is disingenuous in light of the fact that their own policies warn that the tactic used may cause death. Likewise, their assertion that the Ninth Circuit relied upon the supposedly debunked theory of "positional asphyxia" is a misstatement. Neither the Appellate Court nor respondent's expert physician relied upon the theory of positional asphyxia. The physician recognized that it was the mechanical compression of respondent's rib cage which prevented him from breathing properly. It is a mischaracterization of the facts to suggest

that respondent's case relied upon any questionable medical or scientific theory.

Petitioners' second question presented, which raises the issue of the Ninth Circuit's purported *post hoc* analysis "based largely on plaintiff's comatose condition" to somehow portray an "otherwise minimal restraint" as severe force is a red herring. The Ninth Circuit did not simply reason from respondent's injury to the severity of the force. The officers had fair and ample warning of the deadliness and the severity of the force from multiple sources and the Appellate Court, likewise, looked to the facts surrounding the use of force and the warnings which the officers received.

Petitioners' last question presented, whether the Ninth Circuit Court of Appeals drastically departed from the standard of review on summary judgment, is not truly an issue raised by this case. Petitioners maintain that admission of a single piece of evidence, a statement by a witness that petitioner was not resisting, amounted to a drastic deviation from the ordinary course of judicial proceedings. Petitioners' assertion that the Appellate Court relied "exclusively" on this evidence is a misstatement and is misleading as to the appropriate test for excessive force. The Appellate Court also considered the fact that respondent was already cuffed when the force was applied to him, the police expert's opinion that he presented little objectively reasonable threat of flight or harm after being cuffed, and the fact that he was wanted for no crime. Given these circumstances, even without the contested piece of evidence, the Appellate Court would have reached the same conclusion: the degree of force was not warranted. In actuality, the court which did ignore the standards for summary judgment was the District Court. Among numerous other errors, it made the illogical finding that the officers had no reason to believe that the respondent was in respiratory distress, despite the fact that two witnesses stated that he begged for air numerous times.

That Petitioners' argument for the appropriateness of reviewing this case is based on misstatements and omissions is born out by the fact that they omitted crucial parts of Plaintiffs' Statement of Controverted Facts from their Appendix. This document appears, in part only, in Petitioners' Appendix at pages 41 to 50. Although the document contains the petitioners' first 26 alleged uncontroverted facts and respondent's responses thereto, it does not contain petitioners' eight remaining facts (27-34) and respondent's responses thereto, and most importantly, it tellingly omits respondent's 27 additional material facts which are crucial to the case and to the appropriateness of summary judgment. Omission of the additional material facts would tend to create the false impression that there are questions presented by this case which are suitable for Supreme Court review. To clarify matters, respondent has included the full document within respondent's Appendix. The Court should be secure in the understanding that this case presents no questions adequate for review.

STATEMENT OF THE CASE

Plaintiff, Brian Drummond, is a Caucasian male who was (at the time of the incident in question) in his early thirties, who has been in a persistent vegetative state or coma as a result of hypoxic encephalopathy from his cardiopulmonary arrest on March 26, 1999, and his treating physician Sunil Arora, M.D. expects him to remain in a vegetative state for the rest of his life. App. 14.

Mr. Drummond's cardiopulmonary arrest was the result of a lack of oxygen to his heart caused by mechanical compression of his chest from police officers setting atop his back. App. 15.

Mr. Drummond has a history of bipolar or manic depressive disorder and schizophrenia. App. 15.

On March 25, 1999, the night before the incident upon which this matter is based, Mr. Drummond's fianceé Olivia

Graves called the police because he had run out of his medication, was experiencing hallucinations and paranoia, and she "wanted him to be taken into a hospital, that he needed medical help, that [she] was worried for him." App. 15.

Two of the officers who responded to the call, Officers Ned and Valentine, were the same as those involved in the subject incident the following night. Ned was the training officer for Valentine, who was a rookie. The officers told Ms. Graves that "they were not a taxi cab" and that they did not think Drummond fit the criteria for a psychiatric hold under California Welf. & Inst. § 5150. App. 15.

The officers were acting in a "not very professional" manner, "joking around a lot", "just saying stuff to each other and laughing", and meanwhile Graves "was in a very serious emotion at that time, [she] wasn't too happy to hear them giggling and making jokes." App. 15.

The next night, the night of the incident, March 26, 1999, Mr. Drummond was in a 7-11 parking lot, unarmed but acting in an unusual manner when a § 5150 call went out to Anaheim police units. The call essentially meant that Mr. Drummond needed medical transport [he was halucianating that snakes and alligators were after him].

A witness, Victor Manuel Calleja, was present when an African American officer (Ned) "knock[ed] Mr. Drummond to the ground where the officers cuffed his arms behind his back as Mr. Drummond lay on his stomach." App. 15.

Calleja related to a District Attorney's Office investigator that: "Drummond was not resisting the officers." App. 16.

The officers left Drummond in the prone position, lying face down on his stomach. "A white officer (McElhaney) put his knees into Mr. Drummond's back and

placed the weight of his body on him. The African American officer also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck." App. 16.

The officers admitted they performed a weapons search sufficient to locate any weapons but found none.

"Mr. Drummond repeatedly told the officers that he could not breathe and that they were choking him. He also told them that he was thirsty and needed a glass of water. The officers however continued to put their weight upon Mr. Drummond's back and neck. [Calleja, the witness] was shocked and surprised that the officers continued to do this when they were obviously causing him to have trouble breathing." App. 16. Despite his pleas that he was having trouble breathing and that they were choking him, the officers continued to apply pressure to Drummond's back for approximately 45 minutes until he ceased breathing.

David Kimbrough, another witness, corroborates Calleja's assertion that Drummond told the officers that he couldn't breathe, and that when he said this the officers did nothing but remain in their position. App. 16.

"The officers were laughing during the course of these events. When the African American officer placed his knee upon Mr. Drummond's neck and one of the white male officers had his knees on Drummond's back the other officers stood around and laughed This statement was taken down by the Anaheim police from Calleja on the night of the incident. App. 16.

Officer Ned estimated he weighed approximately 225 pounds at the time and that Drummond weighed about 160.

"After continuing to put the weight of their bodies on him, Mr. Drummond went limp. The female officer [Valentine] checked his pulse and then they removed his cuffs and turned him over. They then attempted to perform CPR

on him. Then the paramedics arrived and continued trying to revive him." App. 17.

"One of the white officers wanted to ask [Calleja] questions but [he] would not talk to him. Then another officer who had arrived later told [Calleja] that he was a supervisor and that he wanted to hear [his] side of the story. Although Spanish is [Calleja's] first language, [he] spoke to him in English. [He] told him that it was not right, what they did. Because [he] thought Mr. Drummond was dead, [he] told the officer, 'I will tell the family that you killed him.' [He] also told him, 'The black guy put his knee on the back of the neck and the other officers were standing around laughing.'" App. 17.

Sunil Arora, M.D., one of Drummond's treating physicians, a cardiopulmonary expert and Director of the Neurological Care Unit at the hospital where Drummond is residing and being treated, opines to a reasonable medical probability that "on March 26, 1999 [Drummond] suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The lack of oxygen to his heart was caused by his inability to breathe caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner. I believe that this occurred when he was facedown on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding." App. 17.

Arora also notes that, after the incident, the medical records note that Drummond had multiple abrasions and bruises and lacerations to his right wrist. The records also noted "Orthopedic Injury" as "(R) shoulder – pop out (R) knee injury". Arora found this consistent with his opinion. App. 18.

David Dusenbury, former Deputy Chief of the Long Beach Police Department, with 30 years experience as a police officer, who also conducted a "Use of Force Study"

for the Chief of Police, surveying 14 California police departments, opines that: "the police officers used inappropriate restraining force and failed to comply with their Department policies and procedures regarding someone who is suspected of being under the influence of drugs and acting violently. A reasonable police officer would have complied with the policies of the Anaheim Police Department regarding such circumstances. The reasons why reasonable police officers could not believe that they were acting appropriately in this case include the facts that there were numerous and egregious violations of standard police practice, violations of a number of Anaheim's own policies and procedures, the numerous protestations of Drummond witnessed by at least two independent witnesses that he was unable to breathe, the fact that he was not being stopped for a serious crime but because of his mental disturbance, the fact that after he was cuffed he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers reflected by the fact that, if true, they were laughing at Drummond during the incident. Further, Anaheim's Police Department had longstanding policy for many years before the incident which warned of putting arrestees in Drummond's state at risk of respiratory failure." App. 18-19.

"The officers actions were violations of Anaheim Police Department Manual Section 525.00, 'Control and Transportation of Restrained Subjects':

-Section A., 'If a subject must be maximally restrained, he shall be placed on his right or left side and maintained on his side, and his breathing shall be monitored constantly.'

-Section B., 'Do not place a restrained subject in a face down "prone" position.'

-Section G., 'Supervisors should make every effort to be present on the scene of these incidents.'" App. 19.

"As early as 1992, more than six years before the incident, Anaheim Law Enforcement Bulletin 92-172, dealing with 'Control and Transportation of Restrained Subjects' warned of the proper '[c]ontrol of violent/restive subjects suspected of being mentally disturbed or under the influence of alcohol and/or a controlled substance'. Section 1 speaks of potential risk of interference with respiration and asphyxia when prisoners are transported in a prone position. Section 6 states, 'After being restrained, violent/restive individuals will be constantly monitored.' Section 7 states, 'Supervisors should make every effort to be present on the scene of such incidents.' Anaheim Training Bulletin 96-19 'Positional Asphyxia During Law Enforcement Transport' reiterated in 1996 many of the same and similar warnings. Anaheim Training Bulletin 98-14 'Positional Aspyxia' cites an 'expert in the field' as noting that **'when one or more officer's are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, 'That may be a precipitating factor in causing death.'"** [Emphasis added.] That Bulletin also warns of the danger of the prone position (albeit with regard to transportation), the need to monitor violent/restive individuals after they have been restrained, and that supervisors should make every effort to be present on the scene of such incidents." App. 19-20. Here, the original call and the very purpose of the officers' responding was to control, restrain and transport a subject [here a mentally disturbed man under California Welfare & Institutions Code § 5150 who the officers were attempting to transport in the police unit and/or by ambulance. No supervisor was present at the scene on March 26, 1999 until after Drummond had already ceased breathing.

The April 1998 Bulletin notes that "[t]here are numerous other options now available for restraining a combative subject".

Dusenbury also opines "that Officers Ned, Valentine and McElhaney inappropriately discussed their opinions and tactics in the presence of and within the hearing distance of Brian Drummond, knowing that (including from their encounter with him the previous day) he suffered from some mental illness. Such actions likely exacerbated his paranoia and triggered reactions from him that may not otherwise have occurred. No effort was made to 'talk Drummond into custody' or assure him that they were there to help him not hurt him." App. 20.

Dusenbury further opines: "Although the officers maintain that placing Drummond in the prone position and placing their body weight on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the back at the time. After application of a leg restraint, he could have then been placed in the police vehicle, 'seatbelted', and safely transported. There is no purpose to be served by placing Drummond on the ground except, momentarily, unless the officers intend to apply leg restraints." App. 20-21.

On the evening of the incident, one of the officers spoke to Drummond's fianceé, Olivia Graves, on the phone and, despite the fact that Drummond said he wanted to kill himself, asked her either that she take Drummond to the hospital or that they return him to her residence. Dusenbury also opines that returning Drummond to Graves' custody when he is expressing suicidal intent would also be misconduct on the part of the officers. App. 21.

Dusenbury has further opinions as follows: "Use of continuing force on Drummond's back and neck/shoulder area was inappropriate and dangerous, particularly for a suspected mentally ill person who was suspected of having ingested drugs. It is common knowledge among citizens and police that a sufficient amount of force exerted on the chest or back of an individual will interfere with normal breathing. Not only was this a violation of standard police practices but was also a violation of Anaheim Police Department policy. The fact that their own Department had articulated numerous times, beginning more than six years before the incident, if not earlier, a policy against interfering with the respiration of individuals such as Drummond in this manner, the officers could not reasonably claim they were mistaken as to the appropriateness of their use of restraining force. The fact that, if true, they laughed at Drummond and ignored his pleas to let him breathe further eliminates the possibility that they could have been reasonably mistaken about their conduct." App. 21-22.

It should be noted that two of the officers involved in this incident have had serious discipline problems. Sawyer has been disciplined three times and Ned was given a discipline just short of termination. Officer Ned had received a 90-day suspension for Violation of Rules, Unbecoming Conduct, Unsatisfactory Performance, and Departmental Reports/Memos (reported 11/28/98 – four months before the incident). App. 22.[2]

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[2] This paragraph founded upon Petitioners' Answers to Interrogatories, though largely omitted from respondent's Statement of Controverted Facts due to a clerical error, was part of the record in the District Court and the record on appeal. All of the facts stated in this Statement

(Continued on following page)

Officer Sawyer had received Counseling for Unsatisfactory Performance and Use of Weapons (5/31/95), a Written Reprimand for Unbecoming Conduct, Unsatisfactory Performance (6/26/98), and a subsequent 25-hour suspension for Violation of Rules, Unbecoming Conduct, Unsatisfactory Performance and Identification (12/2/00). Dusenbury notes that the discipline received by Ned is just short of termination. App. 22.

After filing the notice of appeal, respondent discovered facts which had been concealed by petitioners during discovery, namely that the Orange County District Attorney's Office had referred a matter to the State Attorney General for prosecution of Officer Ned for the crimes of perjury and falsification of a police report. The Attorney General's office concluded that Officer Ned had clearly falsified a police report and lied under oath and only declined to prosecute Officer Ned because of its concern about the element of materiality, and suggested to the Anaheim Police Department that it take administrative action against Officer Ned.

Based upon the developments relating to the concealed facts, respondent filed a *Crateo*[3] motion with the district court seeking an indication of its willingness, if given a limited remand, to entertain a motion to reopen the case[4]. The District Court denied the motion. If the district court had indicated such a willingness, respondent would have filed with the Appellate Court a limited motion

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of the Case were part of the record whether or not they appeared in respondent's Statement of Controverted Facts.

[3] *Crateo v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 2000).

[4] See *Romero v. City of Pomona*, 883 F.2d 1418, 1423 (9th Cir. 1989). Such a motion is a prerequisite to a limited motion to remand.

to remand.[5] Appellant sought the Appellate Court's judicial notice of the *Crateo* motion and the supporting evidence therein regarding the concealed evidence. Although the Appellate Court denied the request for judicial notice, respondent maintains that in the event that review of this matter is granted such evidence would be a proper part of the record.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN AUTHORITY EITHER AMONG THE CIRCUITS OR BETWEEN THE NINTH CIRCUIT AND THIS COURT WITH REGARD TO WHETHER THE CONDUCT OF THE OFFICERS IN THE INSTANT CIRCUMSTANCES WAS CLEARLY ESTABLISHED AS EXCESSIVE FORCE, SINCE ANY APPARENT DIFFERENCES ARE DISTINGUISHABLE ON THE FACTS.

In light of the long period of time that defendants placed their knees on Drummond's back, the fact that he was already cuffed and presented little threat of flight or to officer safety, that a weapons pat-down revealed no concealed weapons, that he was not stopped for committing a crime, that the officers laughed at him as they ignored his pleas to let him breathe, that they all denied under oath in deposition that he made such pleas, and that long standing police practices as well as their own department policies prohibit restraining persons in Drummond's condition in this manner, no reasonable officer could believe that they were acting lawfully. Based upon these facts, taken in the light most favorable to the

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[5] See *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 722, fn.2 (9th Cir. 1986).

respondent, the Ninth Circuit held that (1) officers' alleged act of continuing to press their weight onto detainee's neck and torso as he lay handcuffed on ground and begged for air constituted use of excessive force, and (2) officers were not entitled to qualified immunity, having received fair warning via departmental policy and other means that alleged actions constituted excessive force.

The Ninth Circuit opinion in this case represents neither a conflict with this Court nor the Federal Courts of Appeal. The opinion below is consistent with *Saucier v. Katz*, 533 U.S. 194 (2001) as well as other pertinent Supreme Court authority. Given the same facts, other Circuits would be compelled to make the same ruling. The reason being that what separates the instant case from different results in different Circuits is different facts.

Petitioners would have the Court believe that case law must have held that the specific type of force used in the precise circumstance constituted a constitutional violation in order for the police officers' constitutional violation to be considered clearly established. It is not so. In *Deorle v. Rutherford*, 272 F.3d 1272, 1285-1286 (9th Cir. 2001), which is in many regards is closely on point with the instant case[6], the Ninth Circuit, citing this Court, *inter alia,* specifically addressed this issue:

> Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity:

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[6] *Deorle* does not involve a similar use of force but was closely on point regarding the circumstances of the plaintiff who "committed no serious offense, is mentally or emotionally disturbed, . . . , poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals". *Id.* at 1285. Plaintiff, likewise, was not stopped for crime but because of his mental state and after being cuffed presented little threat of flight or safety.

> notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful"). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When "'the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.' *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.1994) *quoting Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993)). This is such a case.

This Court less than two years ago restated this same principle that an officer can still be on notice that his conduct violates established law even in novel factual circumstances:

> Our opinion in *Lanier*[7] thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier,* we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of

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[7] *U.S. v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

> cases with "materially similar" facts. Accordingly, pursuant to *Lanier,* the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Hope v. Pelzer, 536 U.S. 730, 741 (2002).

In *Hope*, an Eighth Amendment case, the Court stated that Alabama prison guards who had cuffed an inmate to a hitching post for long periods of time were not entitled to qualified immunity on summary judgment, despite the fact that there were no previous cases materially similar to the inmate's. *Id.* The Court reiterated that a general constitutional rule may be sufficient to give the officers fair warning that their conduct violates a clearly established right. *Id.*

Notably, the Court also looked to an Alabama Department of Corrections (ADOC) regulation and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post in finding that the constitutional violation was clearly established. *Id.* at 741-742. Likewise, here the multiple Anaheim policies relating to this matter and the warning of the expert in their 1998 Training Bulletin[8] regarding the deadliness of their tactic, in addition to police standards, the specific circumstances and the case law gave the officers "fair warning" that they were not acting within the confines of the law, and that therefore they were violating a clearly established right.

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[8] Anaheim Training Bulletin 98-14 'Positional Aspyxia' cites an "expert in the field" as warning that "when one or more officer's are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, 'That may be a precipitating factor in causing death.'" App. 19-20.

Numerous cases in different circuits have held that circumstances similar to the present were excessive force which was not entitled to qualified immunity. For example in *Simpson v. Hines*, 903 F.2d 400, 401-404 (11th Cir. 1990), where Simpson was arrested after a confrontation with a police officer over officer's mistaken suspicion that Simpson stole his pen, was in a drug-affected state, refused to be searched and brandished marijuana, was said to have resisted causing the officers to put him in a choke hold and force him to the ground, and where a large officer nicknamed "beef" sat upon the him, "Simpson [could] be heard alternately cursing, saying 'all right, all right' asking the police to 'lighten up,' and then begging for help and screaming." The court recited the facts as including a physician's report that "Simpson could have died of asphyxiation resulting from the pressure exerted when [officer] sat on his chest [and] [d]efendants claim[ed] that such force was necessary" and the court there determined that there was "*ample evidence that the defendant officers who entered Simpson's cell reasonably should have known that in subduing and searching Simpson they maliciously used force which was grossly disproportionate to the need and was calculated to injure Simpson severely.*" *Id.* at 403 [emphasis added]. It is significant that despite Simpson's resistance and pleas, which one could try to characterize as a "ploy," the court found that the force was excessive and not protected by qualified immunity.

For other cases with similar facts where qualified immunity was not applied see: *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) [Mildly retarded man picked up a five dollar bill that a woman had dropped in a bus station, officer used a wrestling maneuver wrenching Rowland's knee until it cracked, Rowland apparently only offered resistance in instinctively trying to protect himself, and court held that no reasonable officer could have believed his conduct to be lawful in light of the circumstances.];

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997) [Smith raised a baseball bat in a threatening manner at police, he dropped bat and ran when officer raised his gun, when apprehended the officer pulled his arm into a position of discomfort, when Smith complained the officer used additional force breaking his arm, and the court held that, viewing the facts in the light most favorable to Smith, unlawfulness of the conduct was readily apparent even without clarifying caselaw.]; *Johnson v. City of Milwaukee*, 41 F.Supp.2d 917 (E.D.Wis. 1999) [Johnson was involved in an altercation from which the other participants fled, Officer pushed him against a fence, put Johnson into a "half-Nelson" wrestling hold, apparently struck Johnson in the teeth with his gun after which it discharged shattering Johnson's teeth and exiting through his left cheek, and court held that because Johnson committed a low level battery, posed no immediate threat and was under the officer's control the officer was not entitled to qualified immunity as he would have lost nothing by refraining from escalating the level of force.]; *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000) [Handcuffed plaintiff asked officers to not hurt his neck to which officer responded with an obscenity, officers then picked plaintiff up placed him on hood of car, plaintiff lost feeling in his arm and slid off car at which time he was kicked in leg, the back and back of the head. Held excessive force and the officers were not entitled to qualified immunity.]; and *Franzell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996), *abrogated to the extent that it conflated the excessive force and qualified immunity inquiries,* [Arrestee, who was stopped for drunk driving and who suffered seizures, resisted and cursed at officers, officers continued to strike him after he was subdued with one officer on his back and the other two holding him down, court held that jury could have found that officers acted unreasonably by continuing to use force after he was subdued.]. Each of these cases are in addition

to the Ninth Circuit Court cases *Deorle*, *supra*, 272 F.3d 1272, *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1207 (9th Cir.2000) and *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

In the instructive Fifth Circuit case *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), in which a detainee who died, had consumed cocaine, was in a state of delirium, was hog-tied in the prone position and transferred in a patrol car without having his breathing monitored, the court, distinguishing *Price*[9], found triable issues of facts which could establish a constitutional violation and found that qualified immunity did not apply. In that case there was no evidence to suggest that the detainee expressed his inability to breathe, that officers ignored his pleas, that officers laughed at him as they engaged in these acts, or that the officers subsequently lied about hearing his pleas[10]. Kimbrough, estimates that they had Drummond on the ground for approximately an hour. By Anaheim's own admission they had him on the ground the *second* time about 18 minutes.

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[9] *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998), the somewhat aberrant and widely disregarded district court case upon which Petitioners heavily rely.

[10] Two witnesses, Kimbrough and Calleja, state that Drummond told the officers he could not breathe. Calleja states he did so numerous times. Officer Valentine states she heard no such pleas. (Ramirez Dec., Exh. 6, Valentine Dep., 57:4-20). The other officers make the same denial. The facts must be taken in the light most favorable to Plaintiff and reasonable inferences in favor of Plaintiff should be taken therefrom. The reasonable inference from this conflicting testimony is that the officers are lying and are doing so to cover up their knowledge of and indifference to Plaintiff's respiratory distress. That Defendants now assert that Plaintiff's pleas were a "ploy" discloses their duplicity; if he never made the pleas of distress they could not very well be a ploy.

It is not uncommon for courts to consider the fact that police officers have laughed at or mocked plaintiffs to determine the reasonableness of their acts. [See *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *Liston v. County of Riverside*, 120 F.3d 965, 97 (9th Cir. 1997)]. The language in *Shaw v. Stroud*, 13 F.3d 791, 802 (4th Cir. 1994) is especially persuasive: "[N]o reasonable officer possessing Stroud's information would believe his actions – laughing at and ignoring complaints of excessive force perpetrated by an officer he supervised – to be lawful." In *Kostrzewa v. City of Troy*, 247 F.3d 633, 641 (6th Cir. 2001), a Sixth Circuit case, also instructive, the appellate court referred approvingly to its previous unpublished decision where it "affirmed the district court's denial of defendant's motion for summary judgment on the grounds of qualified immunity, stating that the facts alleged could support recovery on a claim of excessive force." The facts of the previous decision included the police officer tightening the hand cuffs to the point where Plaintiff was losing circulation and then "[u]pon removing the cuffs, the officer laughed and said: 'I guess they were on too tight!'" *Id.* *Kostrzewa* also reiterated that "**the right to be free from excessive force**, including "excessively forceful handcuffing," **is a clearly established right for purposes of the qualified immunity analysis**." *Id.* [Emphasis added]. The fact that the officers laughed as they inflicted force upon Drummond, one more distinguishing fact, further demonstrates that reasonable officers in their positions would not have considered Drummond a serious threat of injury or flight, thus the quantum of force used was not justified.

Notwithstanding the cases from other circuits, *supra,* in which immunity was not applied, petitioners, for the proposition that the Federal Circuits are in conflict with the Ninth Circuit on this matter, in their petition at pages 10-12 quote *Unzreta v. Steele*, 291 F.Supp.2d 1230, 1238-1239

(D.Kan. 2003) which cites *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997) and a number of similar cases. There are myriad facts distinguishing *Phillips* from the instant case. Unlike Drummond, it was undisputed that Phillips "was on the floor for only a few minutes." *Id.* at 594. In *Phillips* there was lacking the "additional circumstances, such as drug use or other physical problems, [which] usually contributed to the deaths in the [other] situations". *Id.* at 594, fn. 1. Officers actually monitored Phillips' breathing (*Id.* at 594), whereas they ignored Drummond's pleas of respiratory distress. Phillips "became extremely violent", had two ball-point pens in his clenched fists which he refused to drop, kicked violently and tried to bite one of the officers. *Id.* at 588-589. There were no facts suggesting Phillips complained of respiratory distress. Further, unlike the instant case, in *Phillips* "leaving Mr. Phillips face down while handcuffed comported with the Milwaukee Police Department's policies. Since Mr. Phillips' death, the policy has been amended; officers are now told to seat or stand an individual as soon as possible once the individual is restrained." *Id.* at 590. Thus in *Phillips* there was no argument that the officers were in violation of their department policies or that they had been apprised of the potential danger to Phillips.

Petitioners cite another case, *Tobias v. County of Putnam*, 191 F.Supp.2d 364 (S.D.N.Y. 2002), where, unlike Drummond, the arrestee actually violently resisted (not just cussing and squirming) by fighting, punching, kicking and biting. Moreover, the court did not find excessive force in *Tobias* "due to the absence of any significant diminished capacity" which could put the arrestee at greater risk of harm from the restraint. *Id.* at 378. The court also noted that (unlike Drummond) the arrestee "does not claim that he complained to the officer defendants about their use" of the restraint. *Id.*

Petitioners' quote also cites *Wagner v. Bay City, Tex.*, 227 F.3d 316 (5th Cir. 2000). However, there are numerous facts distinguishing that case from the instant and for finding that there was no excessive force. In that case the arrestee truly violently resisted: "[The arrestee] jumped off a stool and started swinging his fists, striking [the officer] several times." *Id.* at 318. The court also noted: "We are careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while confronted with a violent individual." *Id.* at 321. Drummond's circumstances were not split second but dragged out for 45 minutes after he was cuffed and knocked to the ground, nor was he violent. (Even Appellees admit that Drummond was on the ground for 18 minutes the second time). Also in *Wagner* there was no evidence that the arrestee was at risk as Drummond was: "Likewise, several of the other required conditions in the SCDS report are not present here, including the fact that there is no evidence Gutierrez was a drug user, much less that there was a risk of "cocaine psychosis." *Id.* at 324. Furthermore, in that case the court considered four potential causes of sudden custody death and found that all four plainly were not present. *Id.* 323-324.

In *Rodriguez v. Farrell,* 94 F.3d 1276, 1278 (11th Cir. 2002), also cited by Petitioners, the officer was not acting unreasonably in ignoring the arrestee's claim of an injured arm because of the context of the case including, *inter alia*, that he reasonably believed that arrestee was a fugitive who had evaded capture and because the arrestee had no obvious signs of injury. Here, the officers knew of Drummond's particular risk of harm. *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) is also distinguishable. *Jackson* was distinguished in *Santos v. Gates*, 287 F.3d 846, 855, (9th Cir. 2002), where it was noted the officers in *Jackson* could ignore the arrestees, pleas because it had a much greater governmental interest in the application of

force, as that case involved a scene described as a "melee", where six officers faced a group of thirty to fifty citizens who refused to obey the officers' commands to disperse. This overwhelming governmental interest is lacking in the instant case.

On close examination, it is apparent that the cases in other circuits (and in the Ninth Circuit) which had different results than the *Drummond* case also had different facts. Indeed, there is indisputably no conflict between the circuits.

To borrow a phrase from the bard, petitioners' arguments regarding positional asphyxia are tales "full of sound and fury, signifying nothing."[11] *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998), a district court case upon which petitioners heavily rely for the proposition that the force used upon Plaintiff was not a constitutional violation, is in many regards an aberration and has been wisely disagreed with and distinguished in subsequent cases[12]. It is also factually distinguished from the present case, because Plaintiff here does not rely upon the theory of "positional asphyxia" assailed in the *Price* case. Plaintiff does not merely assert that, being in a drug induced state of "excited delirium," his injuries were caused only by being put in the prone position. Dr. Sunil Arora, Drummond's treating physician and a cardiopulmonary expert, states to a reasonable medical probability Drummond's cardiopulmonary arrest was caused by mechanical compression of his lungs. App. 17. Here, the

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[11] William Shakespeare, Macbeth, Act 5, Sc. 5, lines 26-28.

[12] *Negative treatment by Gutierrez v. City of San Antonio*, 139 F.3d 441 (5tn Cir.(Tex.) 1998); *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (S.D.Ohio 1999); and *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, (10th Cir. 2001).

officers actually put pressure upon Drummond's back for almost 45 minutes despite his pleas that he couldn't breathe, causing him to be unable to breathe – mechanical compression. His mental and physiological state put him at a greater risk of this – as Anaheim P.D. policy notes in several places and of which the officers, therefore, either were, or should have been, aware.

The reasoning of *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013, 1015-1017 (S.D.Ohio 1999), distinguishing and criticizing *Price*, points out that the study in *Price*, which purportedly debunked positional asphyxia claims, was itself flawed in that, among other things, it dealt only with the risk posed to healthy individuals without any affirmative use of mechanical compression and not the increased risk to individuals in a state of agitation, intoxication or delirium:

> The decision of the Honorable Judge Rhoades, Southern District of California, in *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998), does not change this Court's conclusion. In *Price*, Judge Rhoades concluded that the work of Dr. Donald Reay, the scientist credited with first hypothesizing the concept of positional asphyxia, had been successfully refuted by Dr. Tom Neuman, a researcher who is also Defendant City's expert in this case. See *id.* at 1237-38. Dr. Neuman attacked Dr. Reay's methodology and results. See *id.* Judge Rhoades stated that Dr. Neuman refuted both the premise that blood oxygen levels decrease after exercise – or for purposes of the case now before the Court, when a person is suffering from agitated delirium – and the ultimate conclusion that being restrained in a prone position prevents the lungs from replenishing the blood's oxygen supply. [FN2] See *id.* at 1238. According to the Price decision, even Dr. Reay now concedes that the restraint at issue was "physiologically neutral." Id.

* * *

> Because Dr. Reay's study appears to be a critical foundation of subsequent studies supporting sudden death by agitated delirium with restraint, including those by Dr. O'Halloran, the City argues that Dr. O'Halloran's report should not be considered scientific evidence. The Court disagrees and believes this is a classic "battle of the experts" situation. First, Dr. O'Halloran offers his own published study on agitated delirium with restraint as support for his conclusion regarding Wilder. In *Price*, only Dr. Reay was specifically challenged. Dr. O'Halloran's studies may not have used the same methodology found to be flawed in *Price*. Second, the University of San Diego study published by Dr. Neuman and his colleagues has its own limitations which makes questionable its application to Wilder's death. The University of San Diego study was restricted to healthy subjects. It did not attempt to duplicate field conditions. Finally, the study admitted that underlying medical conditions, intoxication, agitation, delirium, struggle, and body position could all affect respiration in a way that the study could not detect. Chan, Vilke, Neuman, & Clausen, Restraint Position and Positional Asphyxia, *Annnals* [sic] *of Emergency Medicine,* November 1997 . . . At the time of his death Wilder was obese, had tested positive for marijuana, and was suffering from agitated delirium. These factors differentiate him from the study participants. On the basis of the record before the Court at this time, the Court cannot conclude that the University of San Diego study debunks the theory of positional asphyxia to an extent rendering the testimony of Dr. O'Halloran inadmissible as scientific evidence.

The very article upon which the decision in *Price* relies was an exhibit to the Deposition Transcript of

Charles Wetli, M.D., which was lodged in support of Anaheim's Motion for Summary Judgment. The study itself also recognized its other limitations, i.e. that it did not take into account field conditions such as mechanical compression: "This study did not attempt to duplicate exact field conditions under which restraint position deaths have occurred. . . . In addition, these individuals may have been subject to forceful apprehension, during which pressure may have been exerted on their backs while they were in the restraint position. What effects these differences may have remain to be determined."

In *Johnson, supra*, the police restrained the individual in a prone position with his hands cuffed behind his back and his legs tied, and he died of "cardiac dysrhythmis" due to "agitated delirium with restraint". In *Cruz v. City of Laramie, Wyo.* 239 F.3d 1183, 1188 (10th Cir. 2001) the court noted that "[i]n *Johnson v. City of Cincinnati,* the Southern District of Ohio found sufficient information existed in the law enforcement community to **put the authorities on notice that positional asphyxia was a problem nationwide**." [Emphasis added].

In the instant case the information not only existed in the law enforcement community as noted in *Johnson* and *Cruz*, (Dusenbury says it violated standard police practice), it also existed in Anaheim's training materials at least as early as 1992. App. 19. It was the subject of at least three training bulletins and one section of the Department Manual. An Anaheim police officer could not have reasonably believed that restricting the breathing of a detainee such as Drummond by setting on his back – especially for such a long period of time after he was already cuffed – was legally permissible.

On a review of the cases, it is evident that there is an absence of any conflict in authority.

II. PETITIONERS' ASSERTION THAT THE NINTH CIRCUIT MADE A *POST HOC* ANALYSIS "BASED LARGELY ON PLAINTIFF'S COMATOSE CONDITION" TO SOMEHOW PORTRAY AN "OTHERWISE MINIMAL RESTRAINT" AS SEVERE FORCE IS A RED HERRING, AS THAT COURT APPROPRIATELY USED THE GRAHAM ANALYSIS OF FACTORS KNOWN TO THE OFFICERS AT THE TIME OF THE INCIDENT.

A plain reading of the Ninth Circuit's opinion shows that it did not simply reason from respondent's injury to the severity of the force. The officers had fair and ample warning of the deadliness and the severity of the force from multiple sources and the Appellate Court, likewise, looked to the facts surrounding the use of force and the warnings which the officers received.

Graham v. Connor, 490 U.S. 386, 396 (1989), instructs a court considering the issue of excessive force to engage in the "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." The court is to consider the government's interests as measured by "the severity of the crime at issue, the threat that the suspect poses to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting flight." *Id.*

In this case, Drummond was not stopped for a crime, he posed little threat to the safety of the officers as he was cuffed behind the back and there were at least three officers, the officers conducted a weapons pat down and found no weapons, at least one witness says he did not resist, the officers laughed as they applied the force and Drummond could not very well flee in light of the nature of his restraint and the number of the officers. In many respects this is a garden variety excessive force case where officers knocked Drummond to the ground, handcuffed

him and squeezed the life out of this mentally disturbed man for about 45 minutes while they laughed at him despite his pleas that he couldn't breathe. These facts, properly considered in an excessive force analysis, do not constitute a *post hoc* analysis

III. THE NINTH CIRCUIT COURT OF APPEALS DID NOT IN ANY WAY DRASTICALLY DEPART FROM THE STANDARD OF REVIEW ON SUMMARY JUDGMENT, AS THE APPELLATE COURT'S DECISION WOULD HAVE BEEN THE SAME EVEN ABSENT THE CONTESTED EVIDENCE.

In an attempt to frame a reviewable issue, petitioners assert that the Ninth Circuit Court of Appeals drastically departed from the standard of review on summary judgment. Yet no such departure was made by the Court. Petitioners maintain that admission of a single piece of evidence, a statement by a witness that petitioner was not resisting, amounted to this subversion of the standard of review on summary judgment.

The argument that the Court below relied "exclusively" on this evidence is a misstatement and is misleading as to the appropriate test for excessive force. Whether or not a detainee is "resisting", in the sense of engaging in any sort of defiance, is not the *sine qua non* of an excessive force inquiry. Under the *Graham*[13] test the court is to balance the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the force was objectively reasonable under the circumstances. The Appellate Court also considered the fact that respondent

[13] *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865 (1989).

was already cuffed when the force was applied to him, the police expert's opinion that he presented little objectively reasonable threat of flight or harm after being cuffed, and the fact that he was wanted for no crime. Given these circumstances, even without the contested piece of evidence, the Appellate Court would have reached the same conclusion under Graham: the degree of force was not warranted. In actuality, the court which did ignore the standards for summary judgment was the District Court. Among numerous other errors, it made the illogical finding that the officers had no reason to believe that the respondent was in respiratory distress (Petitioners' App. 31), despite the fact that two witnesses stated that he begged for air numerous times (App. 9 and 16).

It should be noted that the disputed evidence whether or not admissible is a proper matter for consideration by respondent's police practices expert and further supported his opinion that after Drummond was cuffed he presented little objectively reasonable threat of flight or safety.

Petitioners assert that Drummond violently resisted, yet a review of the citations to the record on appeal does not show that he was violent or threatening to others. When the record citations are checked, they reveal nothing that can fairly be described as violent resistance. Pages 182-183 of the excerpts of record on appeal are Officer Ned's version of Drummond's resistance: "tried to pull away from us and stamp his feet into the ground without moving them to walk, grabbing at our uniforms with his hands from the cuffed position, still screaming and yelling." Page 155 of the record states: "Drummond continued to resist and verbally threaten the officer using a constant tirade of profanity." Pages 211-212 are merely Officer Valentine's assertion that Drummond pushed off the car with his feet when they tried to place him in it, an act which was not violent. Although there is Officer McElhaney's self-serving reference in the record, which speculates as to

Drummond's state of mind, that Drummond was trying to injure him, none of the citations to the record refer to Drummond using, attempting to use or possessing any weapon, punching, striking, biting or attempting to do any of those things to any officer. Spewing profanities, wriggling about or refusing to walk are behavior typical of the mentally ill but are not acts of violence.

The petitioners refer to Drummond kicking Officer Sawyer off of him just before he expired. Even if this alleged act could be construed as an act of violence rather than the last act of a suffocating man to save his life, it cannot be the justification for force which was applied for 40 minutes *prior* to its occurrence. Most importantly, it should be noted that petitioners' evidence of Dummond's "resistance", even if undisputed, is not sufficient given all the other facts to justify the quantum of force used.

In light of all the other facts that militated against the uses of such dangerous force, the purported error by the Appellate Court, even by the most generous construction, is at most a mere error devoid of constitutional questions. A mere error by a lower court, absent questions of concern to this Court, is not a proper basis for the granting of certiorari:

> The one reason to proceed is to achieve justice in this particular case. Even if the constitutional question presented is hypothetical as to everyone else, it would seem to be of great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting certiorari – even when unnecessary constitutional pronouncements are not in the picture.

Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 122, 114 S.Ct. 1359 (1994).

Petitioners advance no persuasive rationale that this case presents the narrow class of questions which warrant review by this Court.

CONCLUSION

This case presents no conflict of law but a fact intensive matter easily distinguished from divergent cases, no derogation of this Court's authority but plain adherence, and no drastic departure from the accepted and usual course of judicial proceedings but a mere evidentiary issue which is not even essential to the lower Court's holding. As the questions raised by petitioners fall far short of requiring redress by this Court the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX INDEX

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Plaintiff's Statement Of Controverted Facts And Conclusions Of Law In Opposition To Defendants' Motion For Summary Judgment As To Plaintiff's Claims Set Forth In The Complaint, United States District Court, Central District Of California, Southern Division, Filed January 3, 2002 ..... App. 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRIAN THOMAS DRUMMOND, by and through his Guardian ad Litem, THOMAS R. DRUMMOND Plaintiffs, vs. CITY OR [sic] ANAHEIM, a California municipal entity; ANAHEIM POLICE DEPARTMENT, a California municipal entity; ROGER BAKER; ANAHEIM POLICE DEPARTMENT OFFICERS, the identity and number of whom are presently unknown to plaintiff; and Does 1-10, inclusive, Defendants.	CASE NO. SA CV 00-243 AHS (ANx) PLAINTIFFS' STATEMENT OF CONTROVERTED FACTS AND CONCLUSIONS OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS SET FORTH IN THE COMPLAINT DATE: January 14, 2001 TIME: 10:00 a.m. COURTROOM: 10A HONORABLE ALICEMARIE STOTLER

Plaintiff hereby submit [sic] the following Plaintiffs' Statement of Controverted Facts and Conclusions of Law pursuant to Central District of California Local Rule 56 in Opposition to the Summary Judgment as to Plaintiff's Claims Set Forth in the Complaint filed by Defendants.

MOVING PARTY'S ALLEGED UNCONTROVERTED FACTS	**PLAINTIFF'S RESPONSE**
1. On March 26, 1999, Anaheim police were contacted by Drummond's neighbor Kimbrough and Creath with a report that Drummond posed a threat to the residents and to himself. (Kimbrough deposition, 24:9-25; 26:2-6)	1. Undisputed.
2. When police responded, they recognized Drummond as the same subject of a call from Drummond's girlfriend on March 25th wherein she had requested police take him into custody as a §1550 (danger to himself and other). (Ned deposition, 44:10-15; Graves deposition, 19:20-20:24; Valentine deposition, 34:6-35:3).	2. Disputed in part and undisputed in part. Undisputed that Ms. Graves called with regard to Welf. & Inst. Code § 5150. Disputed as to the implication that he presented a danger to others. Ms. Graves testified that Plaintiff had bipolar disorder, had not been taking his medication, had possibly been using narcotics and that "she wanted him to be taken into a hospital, that he needed medical help, that I was worried for him."

	(Ramirez Dec., Exhibit 1, Graves Dep. 19:11-22:16.) Plaintiff also objects that Defendants' statement misstates the law. Welf. & Inst. Code § 5150 refers not to a situation, as Defendants maintain, when a person is a "danger to himself and others" but "[w]hen any person, as a result of mental disorder, is a danger to others, **or** to himself or herself, **or** gravely disabled".
3. When police located him on a busy Anaheim street shortly before 10:00 p.m., Officers noted that Drummond was hallucinating, sweating and incoherent. (Ned deposition, 45:5-9; Valentine deposition, 34:6-35:3; Exhibit C, Call History).	3. Undisputed.
4. When police attempted to speak with him, he appeared to be moving toward the busy Magnolia Street. (Valentine deposition, 44:18-45:5).	4. Undisputed.
5. When they contacted his girlfriend to enlist her aid in calming Drummond, she refused to speak with	5. Disputed in part and undisputed in part. The officers, despite the fact that the they claimed that

Drummond. (Graves deposition, 33:24-35:19).	Drummond wanted to kill himself, wanted To return Drummond to Graves' residence or to have her transport him to the hospital. (Ramirez Dec., Exh. "2", Graves Dep. 34:16-35:12) Police expert Dusenbury states that such conduct by the officers would be misconduct. See Plaintiff's Material Facts ("PMF") 22 and 23, below.
6. With no other options apparent to them, Police on the scene therefore made a decision to take him into custody for his own safety for transportation to a local health care facility under W.I. §5150 evaluation. (Ned deposition, 52:1-16).	6. Undisputed.
7. In his agitated and clearly hallucinative state, Drummond resisted but police succeeded in placing handcuffs on him and requested an ambulance. (Ned deposition, 53:1-23; McElhaney deposition, 25:20-26:13; Exhibit C, Call History).	7. Disputed. Independent witness Victor Manuel Calleja states that Drummond was not resisting the officers. (Ramirez Dec., Exh. "3", Calleja Interview taken by D.A.'s Office, p. 2)
8. Anaheim's practice was to arrange for the transportation of violent subjects	8. Undisputed.

such as Drummond to a medical facility by ambulance, strapped to a gurney. (Rodig deposition, 65:24-66:4, 93:17-96:20).	
9. Drummond continued to resist and fight with police as they attempted to seat him in a patrol car to await the ambulance. They violent resistance. (Sic) (Ned deposition, 54:11-55:22).	9. Disputed. See No. 7, above.
10. When out of the vehicle, Drummond could easily have run away in his manic state, handcuffed or not. That danger was of great concern to officers on the scene. (McElhaney deposition, 28:13-19).	10. Disputed. After he was cuffed, he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers. (Dusenbury Dec. ¶¶ 4, 8)
11. Drummond's continued combatativeness caused police to attempt to control him by placing Drummond on the ground to subdue him and prevent him from fleeing. (Valentine deposition, 47:6-22).	11. Disputed. Police practices expert Dusenbury opines: Although the officers maintain that placing Drummond in the prone position and placing their body weigh [sic] on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the

	back at the time. After application of a leg restraint, he could have then been placed [sic] the police vehicle, "seat-belted", and safely transported. There is no purpose to be served by placing Drummond on the ground except, momentarily, unless the officers intend to apply leg restraints. (Dusenbury Dec., ¶ 8)
12. This struggle continued on the parking lot as three officers were unable to gain Drummond's compliance or keep him safely under control without keeping him down on the ground. (Kimbrough deposition, 59:13-60:4).	12. Disputed. Independent witness Calleja, states that Drummond did not resist. See No. 7, above. Also, the method of restraining Drummond was unnecessary and constituted misconduct. See No. 11, above.
13. Officers tried a second time to place plaintiff into the patrol car, but he was too combative. (Ned deposition, 64:13-66:11).	13. Disputed. Calleja states he did not resist. See No. 7, above. Although the officers claim that they never put Drummond in the patrol car, Kimbrough testifies that they placed him in the car and then removed him and put him back on the ground. (Ramirez Dec., Exh. "4", Kimbrough Dep. 31:18-32:1)

14. Officers repeatedly requested the ambulance to get there. (Exhibit C, Call history; Valentine deposition. 59:1-7).	14. Undisputed.
15. Officer [sic] estimate that plaintiff was on the ground, the second time being restrained for approximately 18 minutes, with plaintiff struggling with them the entire time. (Valentine deposition, 55:1-25; Ned deposition, 73:24-74:25; Kimbrough deposition, 63:10-14).	15. Disputed. Kimbrough estimates that the total time they had him on the ground was for an hour. (Ramirez Dec., Exh. "4", Kimbrough Dep. 35:19-20)
16. The officers never placed their entire weight on the plaintiff, and they had their feet on the ground at all times. (Ned deposition, 71:9-16; McElhaney deposition, 36:15-25; Kimbrough deposition, 43:11-44:1).	16. Disputed. Even Kimbrough, who Dusenbury's report describes as being "pro-police", admits that Valentine put her full weight on him and that all three officers were sitting on him at the same time. (Ramirez Dec., Exh. "4", Kimbrough Dep. 32:19-21, 33:17-19)
17. They also periodically lessened the pressure they were placing on his back and shoulder area. (Kimbrough deposition, 52:22-53:7); McElhaney deposition, 38:4-23); Valentine deposition, 56:1-10).	17. Disputed. Objection misstates Kimbrough's testimony. When asked what the officers said when Drummond told them he was having a hard time breathing, Kimbrough says they just told him to relax.

	(Ramirez Dec., Exh. "4", Kimbrough Dep. 52:22-53-7) However, when asked what they did when Drummond complained of breathing problems, he says "They just – basically, ther [sic] really did nothing. I mean they kept their position." (Kimbrough Dep. 51:21-25)
18. Occasionally, plaintiff would tell the officers that he would stop, and when the officers let up, he would try to flee or injure the officers. (McElhaney deposition, 38:4-23 & 39:6-25).	18. Disputed. Calleja states that Drummond did not resist. See No. 7, above.
19. Although witnesses may have heard plaintiff state he couldn't breathe and that he wanted a glass of water, this was considered a ploy. (Kimbrough deposition, 39:12-40:3).	19. Disputed in part and undisputed in part. Undisputed that Plaintiff was unable to breathe and that he told the officers so. Calleja also stated that Plaintiff said he could not breathe and considered his pleas legitimate. (Calleja Dec.) Further it is disingenuous, and tests the credulity of the court, for Defendants to imply that they considered Plaintiff's pleas a ploy, when each of the officers dubiously denies that he made such pleas. (Ramirez Dec., Exh.

	6, Valentine Dep., 57:4-20) Defendants can not blow both hot and cold at the same time.
20. The officers had no reason to believe that plaintiff couldn't breathe. (Valentine deposition, 57:1-25, McElhaney deposition, 65-10-66:1; Ned deposition, 68:21-69:16 & 74:22-75:9).	20. Disputed. Both Calleja and Kimbrough state that Plaintiff told the officers that he could not breathe. (Calleja Dec., ¶ 5; Ramirez Dec., Exh. "4", Kimbrough Dep. 51:19-25)
21. After a fourth officer, Gregory Sawyer arrived, he tried to control the plaintiff's legs, but plaintiff kicked him away. (Sawyer deposition, 38:14-39:23).	21. Disputed in part and undisputed in part. Undisputed that Plaintiff may have done so and that Sawyer pushed Plaintiff's legs into a hogtie-like position. Disputed as to any inference that Plaintiff was acting violently – all evidence suggests that he was being asphyxiated, as he purportedly expired immediately after this kick. Plaitniff [sic] may have used his last breath to throw off Sawyer, who in addition to the weight of the other officers was lifting Plaintiff's legs off the ground so that they no longer supported their own weight, and added his own weight to that and pushed them towards his buttocks so that even greater weigh was resting

	on Drummonds torso, comprssing [sic] his lungs. (Ramirez Dec., Exh. "7", Sawyer Dep. 38:16-41:14)
22. A leg restraint was then located and used at Drummond's ankles only. As soon as his legs were restrained, Drummond suddenly became unusually docile whereupon officers determined he had lost consciousness. (Valentine deposition, 61:1-25-62:9).	22. Undisputed.
23. Officers immediately released plaintiff from the restraints, called paramedics and initiated CPR. (Valentine deposition, 63-12-20; Exhibit C, Call History).	23. Undisputed.
24. Plaintiff was ultimately revived but he sustained brain damage. (McElhaney deposition, 54:23-55:2).	24. Undisputed.
25. The plaintiff had kicked Sawyer knocking him off balance less than three minutes before paramedics were summoned to revive him. (Exhibit C, Call History; Sawyer deposition, 38:14-39:23 & 41:15-22).	25. Disputed in part and undisputed in part. See No. 21, above.

26. Significantly, the coroner's toxicological results indicated plaintiff was under the influence of cocaine and alcohol with cocaine metabolite levels of 1310 Mg/M1. (Breen deposition 14:12-16:2 with attached coroner's toxicological report).	26. Undisputed.
27. Plaintiff initially disputed the presence of illegal drugs, but his experts have now conceded the toxicology findings are correct. (Plaintiff's First Amended complaint, p.7, ¶23; Breen deposition, 8:2-6).	27. Undisputed.
28. In addition, plaintiff's fiancée testified that she ejected plaintiff from her home because she found him with a cocaine pipe in the early morning hours of March 26, the day of the incident. (Graves deposition, 25:14-26:17).	28. Undisputed.
29. She further testified that he had been released from his "drug rehab" program just a few weeks earlier. (Graves deposition, 16:1-20).	29. Undisputed.

30. Plaintiff claims (though [sic] his guardian ad litem) that he was asphyxiated by the defendant officers when they placed him face down, with handcuffs on. (Plaintiff's First Amended Complaint, p.6, ¶19, lines 10-16).	30. Disputed in part and undisputed in part. Undisputed that he was asphyxiated by the officers. Disputed that Plaitniff [sic] alleges only that it was being placed face down which caused the asphyxiation. It was most notably the weight of the officers on his back compressing his torso, causing a mechanical compression of his lungs. (See Arora and Calleja Dec.) Also, officers were informed that individuals in Plaintiff's state were at increased risk of asphyxia. (Dusenbury Dec., Manual Section and Training Bulletins Exh. 3-6)
31. The police did not strike or kick plaintiff or use any weapon on him. (Ned deposition, 113:22-114:7; Kimbrough deposition, 34:4-7).	31. Disputed. Calleja states that Ned knocked Plaintiff to the ground. (Calleja Dec. ¶¶ 2-3). Disputed also as to any inference that excessive force requires striking, kicking or use of a weapon. The officers plainly violated standard police practices as well as policies of their own department; nor reasonable police officer in their position could have mistakenly believed that

	they were acting lawfully. (See entire Dusenbury Dec., specifically ¶ 4)
32. The emergency room physician who examined the plaintiff that night found no signs of trauma to the head, neck area or torso. (Reid declaration, p.2, ¶5; Exhibit A, pp. 3-4 of West Anaheim Medical Center Emergency Room Medical report of David Reid's, M.D., physical examination of plaintiff).	32. Disputed. Plaintiff had and [sic] abrasion on his face as well as, numerous other abrasions and bruises and orthopedic injuries. The West Anaheim Medical Center Nursing List Patient Notes from March 27, 1999 note that "Patient has multiple abrassions (sic) and bruises". The Patient Admission History/ Assessment form West Anaheim Medical Center under the heading "Skin" has the box "Ecchymosis" checked and also notes "Abrasions". The Comments portion of this section states "see pictures". Copies of photographs dated "3/26/99" in the records show abrasions to the right side of Mr. Drummonds face, also to his left wrist, right elbow, left knee and one other photograph of an abrasion. There are two photographs of lacerations on his right wrist. The Patient Admission History/Assessment form under the heading

	"Musculoskeletal" has the box "Orthopedic Injury" checked and the Comments portion of this section states " (R) shoulder – pop out (R) knee injury". (Arora Dec.. ¶ 4)
33. The plaintiff continued to spew profanities at the officers from the ground until just seconds before they determined he was not responding and he required CPR. (Kimbrough deposition, 38:1-10 & 43-11-45:1).	33. Objection: irrelevant. Whether or not Plaintiff cursed is not probative of any material issue. Conduct which violates his Fourth Amendment rights, would be a violation regardless of whether he cursed ad [sic] the officers or not.
34. The sudden cessation of such conduct is what alerted officers to the possibility of a problem. (Valentine deposition, 62:1-9).	34. Disputed. It was when Plaintiff went limp that Officer Valentine checked his pulse. (Calleja Dec. ¶ 7)

PLAINTIFFS' MATERIAL FACTS

Plaintiff submits the following evidence showing that the following material facts are also in dispute:

1. Plaintiff, Brian Drummond, is a Caucasian male in his early thirties who has been in a persistent vegetative [sic] as a result of hypoxic encephalopathy from his cardiopulmonary arrest on March 26, 1999, and he is expected to remain in a vegetative state for the rest of his life. (Ramirez Dec., Exh. "1", Sunil Arora, M.D.'s 1/15/01 Report, pp. 1, 5)

2. The cardiopulmonary arrest was the result of a lack of oxygen to his heart caused by mechanical compression of his chest from police officers setting atop his back. (Arora Dec. ¶ 3)

3. Plaintiff has a history of bipolar or manic depressive disorder and schizophrenia. (Ramirez Dec., Exh. "1", Sunil Arora, M.D.'s 1/15/01 Report, pp. 1; Ramirez Dec., Exh. "2", Graves Dep. 19:11-19:13)

4. On March 25, 1999, the night before the incident upon which this matter is based, Mr. Drummond's fiancé Olivia Graves called the police because he had run out of his medication, was experiencing hallucinations and paranoia, and that she "wanted him to be taken into a hospital, that he needed medical help, that [she] was worried for him." (Ramirez Dec., Exh. "2", Graves Dep. 18:14-22, 22:14-16, and 25:6-10)

5. The officers told Ms. Graves that "they were not a taxi cab" and that they did not think Drummond fit the criteria for a psychiatric hold under Welf. & Inst. § 5150. (Ramirez Dec., Exh. "2", Graves Dep. 22:17-20)

6. The officers were acting in a "not very professional" manner, "joking around a lot", "just saying stuff to each other and laughing", and meanwhile Graves "was in a very serious emotion at that time, [she] wasn't too happy to hear them giggling and making jokes." (Ramirez Dec., Exh. "2", Graves Dep. 23:17-24:1).

7. On the evening of March 26, 1999 Victor Manuel Calleja was present when an African American officer (Officer Ned) "knock[ed] Mr. Drummond to the ground where the officers cuffed his arms behind his back as Mr. Drummond lay on his stomach." (Calleja Dec. ¶¶ 2-3)

8. Drummond was not resisting the officers. (Ramirez Dec., Exh. "3", Calleja Interview taken by D.A.'s Office, p. 2)

9. The officers left Mr. Drummond in that position, lying face down on his stomach. "A white officer (Officer McElhaney) put his knees into Mr. Drummond's back and placed the weight of his body on him. The African American officer also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck." (Calleja Dec. ¶ 4)

10. "Mr. Drummond repeatedly told the officers that he could not breathe and that they were choking him. He also told them that he was thirsty and needed a glass of water. The officers however continued to put their weight upon Mr. Drummonds back and neck. [Calleja, the witness] was shocked and surprised that the officers continued to do this when the [sic] were obviously causing him to have trouble breathing." (Calleja Dec. ¶ 5)

11. David Kimbrough, another witness corroborates Calleja's assertion that Drummond told the officers that he couldn't breathe, and that when he said this the officers did nothing but remain in their position. (Ramirez Dec., Exh. "4", Kimbrough Dep. 51:19-25)

12. "The officers were laughing during the course of these events. When the African American officer placed his knee upon Mr. Drummond's neck and the one of the white male officers had his knees on Drummonds back the other officers stood around and laughed." (Calleja Dec. ¶ 6; Ramirez Dec., Exh. "5", Anaheim P.D. Supplemental Report re Witness: Calleja)

13. "After continuing to put the weight of their bodies on him, Mr. Drummond went limp. The female officer checked his pulse and then they removed his cuffs and turned him over. They then attempted to perform CPR on him. Then the paramedics arrived and continued trying to revive him." (Calleja Dec. ¶ 7)

14. "One of the white officers wanted to ask [Calleja] questions but [he] would not talk to him. Then another officer who had arrived later told [Calleja] that he was a supervisor and that he wanted to hear [his] side of the story. Although Spanish is [Calleja's] first language, [he] spoke to him in English. [He] told him that it was not right, what they did. Because [he] thought Mr. Drummond was dead, [he] told the officer, 'I will tell the family that you killed him." [He] also told him, 'The black guy put his knee on the back of the neck and the other officers were standing around laughing." (Calleja Dec. ¶ 8; Ramirez Dec., Exh. "5", Anaheim P.D. Supplemental Report re Witness: Calleja)

15. Sunil Arora, M.D., one of Plaintiff's treating physicians, a cardiopulmonary expert and Director of the Neurological Care Unit at the hospital where Drummond is residing and being treated opines to a reasonable medical probability that "on March 26, 1999 [Drummond] suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The lack of oxygen to his heart was caused by his inability to breathe caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner. I believe that this occurred when he was facedown on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding." (Arora Dec. ¶ 3)

16. Arora also notes that after the incident the medical records note that Drummond had multiple abrasions and lacerations to his right wrist. The records also noted "Orthopedic Injury" as "(R) shoulder – pop out (R) knee injury". Arora found this consistent with his opinion. (Arora Dec.. ¶ 3)

17. David Dusenbury former Deputy Chief of the Long Beach Police Department with 30 years experience as a police officer, who also conducted a "Use of Force Study" for the Chief of Police, surveying 14 California police departments opines that "the police officers used inappropriate restraining force and failed to comply with their Department policies and procedures regarding someone who is suspected of being under the influence of drugs and acting violently. A reasonable police officer would have complied with the policies of the Anaheim Police Department regarding such circumstances The reasons why reasonable police officers could not believe that they were acting appropriately in this case include the facts that there were numerous and egregious violations of standard police practice, violations of a number of Anaheim's own policies and procedures, the numerous protestations of Mr. Drummond witnessed by at least two independent witnesses that he was unable to breathe, the fact that he was not being stopped for a serious crime but because of his mental disturbance, the fact that after he was cuffed he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers reflected by the fact that, if true, they were laughing a [sic] Drummond during the incident. Further, Anaheim's Police Department had longstanding policy for many years before the

incident which warned of putting arrestees in Drummond's state at risk of respiratory failure." (Dusenbury Dec., ¶ 4)

18. The officers actions were violations of Anaheim Police Department Manual Section 525.00, "Control and Transportation of Restrained Subjects":

-Section A., "If a subject must be maximally restrained, he shall be placed on his right or left side and maintained on his side, and his breathing shall be monitored constantly."

-Section B., "Do not place a restrained subject in a face down 'prone' position."

-Section G., 'Supervisors should make every effort to be present on the scene of these incidents.' " (Dusenbury Dec., ¶ 5, Exhibit 3 thereto, Anaheim Police Department Manual Section 525.00 [This was also exhibit 2 to the Deposition transcript of Anaheim Police Chief Roger Alan Baker]).

19. As early as 1992, more than six years before the incident, Anaheim Law Enforcement Bulletin 92-172, dealing with "Control and Transportation of Restrained Subjects" warned of the proper "[c]ontrol of violent/restive subjects suspected of being mentally disturbed or under the influence of alcohol and/or a controlled substance". Section 1 speaks of potential risk of interference with respiration and asphyxia when prisoners are transported in a prone position. Section 6 states, "After being restrained, violent/restive individuals will be constantly monitored." Section 7 states, "Supervisors should make every effort to be present on the scene of such incidents." Anaheim Training Bulletin 96-19 "Positional Asphyxia

During Law Enforcement Transport" reiterated in 1996 many of the same and similar warnings. Anaheim Training Bulletin 98-14 "Positional Aspyxia" [sic] cites an "expert in the field" as noting that '**when one or more officer's are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, 'That may be a precipitating factor in causing death.'**" [Emhpasis [sic] added.] That Bulletin also warns of the danger of the prone position (albeit with regard to transportation), the need to monitor violent/restive individuals after they have been restrained, and that supervisors should make every effort to be present on the scene of such incidents. (Dusenbury Dec., ¶ 6, Exhibit 4-6 thereto, Training Bulletins 92-172, 96-19 and 98-14 [these were also exhibits to the chief of police's deposition])

20. Dusenbury also opines that Officers Ned, Valentine and McElhaney inappropriately discussed their opinions and tactics in the presence of and within the hearing distance of Brian Drummond, knowing that (including from their encounter with him the previous day) he suffered from some mental illness. Such actions likely exacerbated his paranoia and triggered reactions from him that may not otherwise have occurred. No effort was made to "talk Drummond into custody" or assure him that they were there to help him not hurt him. (Dusenbury Dec., ¶ 7)

21. Dusenbury further opines: Although the officers maintain that placing Drummond in the prone position and placing their body weigh [sic] on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the back at the time. After application of a leg restraint, he

could have then been placed the police vehicle, "seat-belted", and safely transported. There is no purpose to be served by placing Drummond on the ground except, momentarily, unless the officers intend to apply leg restraints. (Dusenbury Dec., ¶ 8)

22. On the evening of the incident, one of the officers spoke to Plaintiff's fiancé, Olivia Graves, on the phone and, despite the fact that Drummond said he wanted to kill himself, asked her to either that she take Drummond to the hospital or that they return him to her residence. (Ramirez Dec., Exh. "2", Graves Dep. 34:16-35:12)

23. Dusenbury also opines that returning Drummond to Graves' custody when he is expressing suicidal intent would also be misconduct on the part of the officers. (Dusenbury Dec., Exh. "2", p. 10, point 19(e))

24. Dusenbury has further opinions as follows: Use of continuing force on Drummond's back and neck/shoulder area was inappropriate and dangerous, particularly for suspected a mentally ill person, who was suspected of having ingested drugs. It is common knowledge among citizens and police that a sufficient amount of force exerted on the chest or back of an individual will interfere with normal breathing. Not only was this a violation of standard police practices but was also a violation of Anaheim Police Department policy. The fact that their own Department had articulated numerous times, beginning more than six years before the incident, if not earlier, a policy against interfering with the respiration of individuals such as Drummond in this manner, the officers could not reasonably claim they were mistaken as to the appropriateness of their use of restraining force. The fact that, if true, they laughed at Drummond and

ignored his pleas to let him breathe further eliminate the possibility that they could have been reasonably mistaken about their conduct. (Dusenbury Dec., ¶ 9)

CONCLUSIONS OF LAW

1. Defendants are not entitled to Qualified Immunity as a matter of law.

four months before the incident. (Ramirez Dec., Exh. 8, Defendants Answers to Special Interrogatories, p. 9)

26. Officer Sawyer had received Counseling for Unsatisfactory Performance and Use of Weapons (5/31/95), a Written Reprimand for Unbecoming Conduct, Unsatisfactory Performance (6/26/98), and a subsequent 25 hour suspension for Violation of Rules, Unbecoming Conduct, Unsatisfactory Performance and Identification (12/2/00). (Ramirez Dec., Exh. 8, Defendants Answers to Special Interrogatories, p. 9)

27. Mr. Dusenbury notes that the discipline received by Ned is just short of termination. (Dusenbury Dec., Exh. "2", p. 18, point 27(a) 1 and 2)

CONCLUSIONS OF LAW

1. Defendants are not entitled to Qualified Immunity as a matter of law.

A. There is a triable issue that facts exist which would justify a finding that the officer's conduct constituted constitutional violations.

B. There issue that facts exist which would justify a finding that the constitutional violation was clearly established.

C. The officers actions were objectively reasonable.

2. Because there was a constitutional violation, thus Defendant's sole attack on the Monell claim fails.

3. Having raised a triable issue as to constitutional violations, the plaintiff's negligent hiring and retention and remaining state law claims do not fail to state a claim.

DATED: December 31, 2001

LAW OFFICES OF FEDERICO
CASTELAN SAYRE

By: /s/ Jorge Ramirez
FEDERICO C. SAYRE
JORGE RAMIREZ
Attorneys for Plaintiffs

PROOF OF SERVICE

State of California, County of Orange

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 900 North Broadway, 7th Floor, Santa Ana, California 92701.

On, December 31, 2001, I served the foregoing document, entitled **PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS SET FORTH IN THE COMPLAINT**, on the interested parties to this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED MAILING LIST

[X] BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] BY FAX: I transmitted the foregoing document by facsimile transmission from (714) 550-9125 to the facsimile numbers indicated on the attached mailing list. The transmission was reported as complete and without error on the transmission report which was properly issued by the transmitting facsimile machine.

[X] FEDERAL: I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED on December 31, 2001, at Santa Ana, California.

/s/ Mary D. Halverson
Mary D. Halverson

Brian Drummond vs. City of Anaheim, et al

USDC CASE NO: SA CV 00-243 AHS (ANx)

Client File No: S1558.001

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